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IN THE

Supreme Court of the United States

October Term, 1967

No. 1092

REED ENTERPRISES, *et al.*,

Appellants,

vs.

RAMSEY CLARK, *et al.*,

Appellees.

MILTON LUROS, *et al.*,

Appellants,

vs.

RAMSEY CLARK, *et al.*,

Appellees.

SANFORD ELESTEL ADAY, *et al.*,

Appellants,

vs.

RAMSEY CLARK, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

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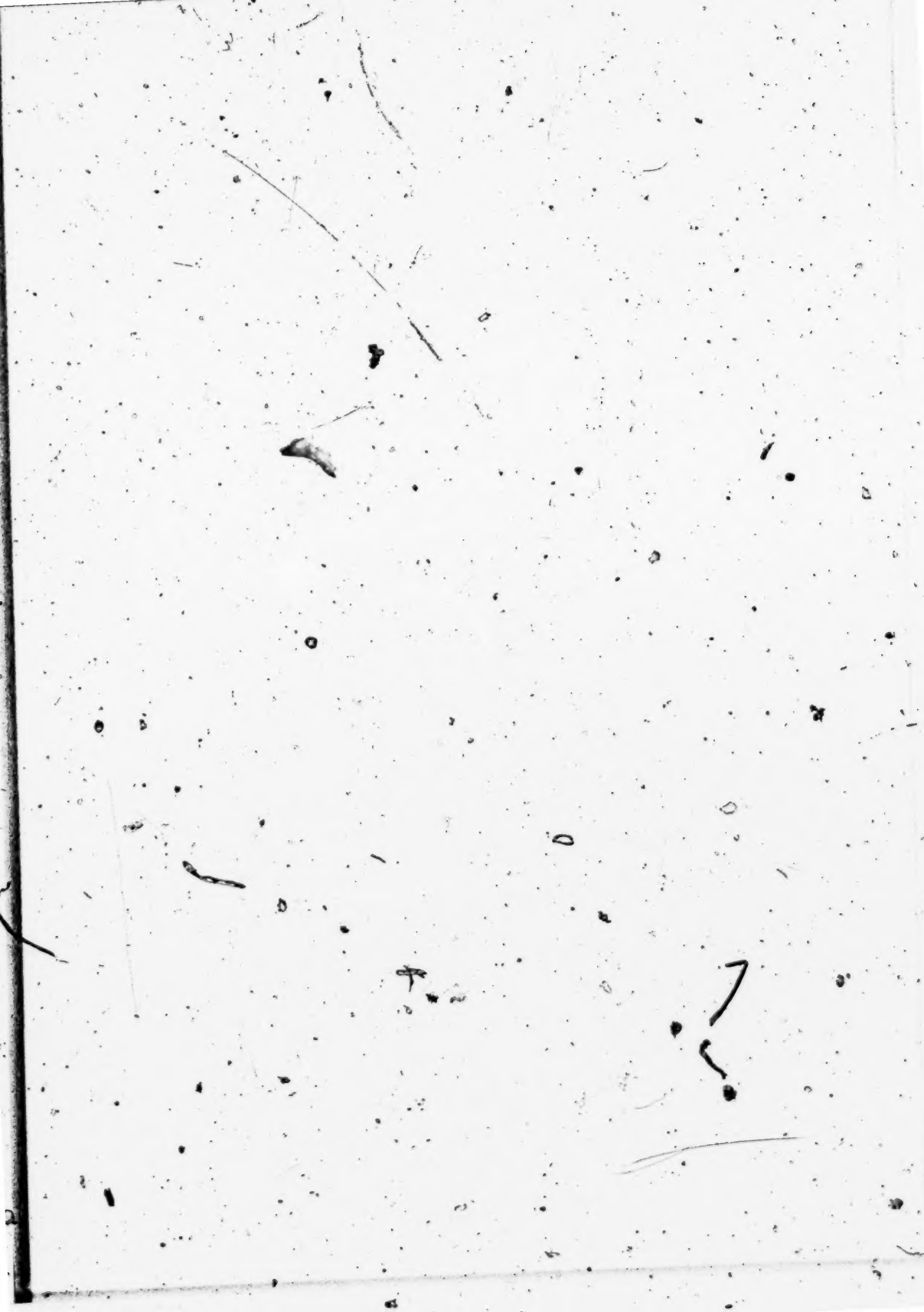

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On Appeal From the United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment and order of the United States District Court for the District of Columbia entered on October 26, 1967, granting the motion of appellees for summary judgment in each of these consolidated actions, denying appellees' motion to dismiss, and denying appellants' motion for summary

judgment. Appellants submit this Statement to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below.

The opinion of the District Court for the District of Columbia is unreported. A copy of the opinion is attached hereto as Appendix A. The opinion of the Court of Appeals for the District of Columbia in the related case of *Reed Enterprises, et al. v. Corcoran* is reported in 354 F. 2d 519 (D.C. Cir. 1965). A copy of the opinion is attached hereto as Appendix B.

Jurisdiction.

These actions were brought under 28 U.S.C. §§1331-1332, 2201-2202, 2282 and 2284, praying for declaratory and injunctive relief, upon the grounds that 18 U.S.C. §§1461 and 1462, as amended in 1958 [Pub. L.85-796, §§1-2, 72 Stat. 962] violate appellants' constitutional rights as guaranteed under the First, Fifth and Sixth Amendments and Article I, §8 of the Constitution. The judgment and order of the District Court (Appendix A) was entered on October 26, 1967, and notice of appeal was filed in that Court on December 12, 1967. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Aptheker v. Secretary to State,* 378 U.S. 500; *Schneider v. Rusk,* 377 U.S. 163; *Dombrowski v. Pfister,* 380 U.S. 479; *Keyishian v. Bd. of Regents,* 385 U.S. 589; *Zwicker v. Koota,* 88 S. Ct. 391.

Question Presented.

Whether the provisions of 18 U.S.C. §§1461 and 1462, as amended in 1958 [Pub.L.85-796, §§1-2, 72 Stat. 962], authorizing unrestrained and unlimited forum-picking by federal prosecutors and multi-venue prosecutions, create vague, ambiguous, overbroad and unascertainable standards; act as a prior restraint upon the circulation of the press; deprive the public of access to constitutionally protected material; abridge freedoms of speech and press; deprive persons of their liberty and property without due process of law and their right to a fair trial and the venue protection of the constitution, and constitute an unlawful delegation of Congressional power, all in violation of the provisions of the First, Fifth and Sixth Amendments, and Article I, §§1 and 8, and Article III, §2 of the Constitution.

Constitutional Provisions, Statutes and Rules Involved.

The pertinent provisions of the First, Fifth and Sixth Amendments and Article I, §§1 and 8, and Article III, §2, of the Constitution; the provisions of the 1958 Amendments to 18 U.S.C. §§1461 and 1462 [Pub.L. 85-796, §§1-2, 72 Stat. 962]; the entire provisions of 18 U.S.C. §§1461 and 1462 as presently effective; the provisions of 18 U.S.C. §3237(a) [Act of June 25, 1948, Chap. 645, 62 Stat. 826; Pub.L. 85-595, 72 Stat. 512]; and Rules 18 and 21(b) of the Federal Rules of Criminal Procedure, are attached hereto as Appendix C.

Statement of the Case.

(a) The complaints herein, filed respectively on July 19, October 14 and December 2, 1965, were similar in character. Each alleged, among other things, that appellants were engaged in the business of publishing and distributing throughout the Nation books, magazines and other writings which are protected from governmental infringement by the provisions of the Constitution. The pleadings further alleged that 18 U.S.C. §§1461 and 1462, as amended, violated appellants' constitutional rights as guaranteed under the Constitution, in that the statutes abridge the exercise of freedoms of speech and press contrary to the provisions of the First Amendment; impose a prior restraint upon the lawful circulation of books and other writings; restrict the public's access to reading material; create a universal censorship; arbitrarily and capriciously deprive persons, including appellants of their liberty and property without due process of law in violation of the Fifth Amendment; purport to authorize arbitrary forum-picking by federal prosecutors and the institution of multiple prosecutions for identical material in districts far removed from the residences and places of business of alleged violators in violation of the free speech and press, due process and fair trial provisions guaranteed by the First, Fifth and Sixth Amendments; and that the statutes, by reason of their vagueness, lack of ascertainable standards and unconfined breadth and scope, abridge the free speech and press and due process provisions of the First and Fifth Amendments.

It was further alleged that the Appellees[1] threatened to enforce 18 U.S.C. §§1461 and 1462, as amended, against the appellants unless restrained by the Court, and that such actions by appellees would necessarily involve appellants in a multiplicity of legal proceedings, result in a destruction of their good-will and property, exhaust their financial and physical resources so as to make it impossible to adequately defend against such multiple criminal prosecutions, and that such conduct would seriously diminish the circulation of Appellants' books and other writings and cause them to suffer substantial and irreparable loss and damage for which Appellants had no adequate remedy at law.

It was alleged that the intent of the Appellees was to employ threats of prosecution, and prosecution, under color of the federal obscenity statutes, in order to harass Appellants and exhaust their financial and physical resources to such an extent as to put Appellants out of business; to thus interfere with the rights of Appellants to publish and distribute constitutionally protected writings, to deny to the public access to Appellants' material, to establish a national censorship of all books and writings dealing with sex, to impose a prior restraint upon the circulation of the press, and to arbitrarily deprive Appellants of their liberty and property without due process of law and to deprive Appellants of their right to distribute constitutionally protected books and other writings in interstate commerce.

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[1]Each of the actions was initially instituted against Nicholas de B. Katzenbach, individually and as the then Attorney General of the United States; and certain named Assistants who were responsible generally in the Department of Justice for the enforcement of the federal criminal laws, and specifically in the area of criminal prosecutions involving violations of 18 U.S.C. §§1461 and 1462, as amended.

Each Appellant prayed for a declaration that 18 U.S.C. §§1461 and 1462, as amended, violate the provisions of the First, Fifth and Sixth Amendments and Article I, §8, of the Constitution; for an injunction restraining the Appellees from any threatened prosecutions, or prosecutions, under the statutes, as amended, and for the convocation of a three-judge court pursuant to the provisions of 28 U.S.C. §§2282 and 2284.

In *Reed Enterprises, et al.* and in *Luros, et al.*, the applications for the convening of a three-judge court were denied by single District Judges sitting in the District Court of Columbia. Thereafter, mandamus proceedings were instituted in the Court of Appeals for the District of Columbia Circuit. In an opinion rendered by the Court of Appeals on December 2, 1965, it was held that "the complaints filed in District Court raise a substantial question as to the constitutionality of the 1958 amendment". (*Reed Enterprises, et al. v. Corcoran* [*Luros, et al. v. Sirica*], 354 F. 2d 519, 522; Appendix B., p. 29), and that a three-judge court was therefore required.

Following the aforesaid proceedings, a three-judge court was constituted, consisting of the Honorable Edward A. Tamm, United States Circuit Judge; John J. Sirica, United States District Judge; and Howard F. Corcoran, United States District Judge, and the three proceedings were consolidated for hearing before the said three-judge court.[2]

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[2]Mandamus proceedings were instituted by *Reed Enterprises, et al.* and *Luros, et al.* prior to the filing of the complaint in *Aday, et al.* The opinion of the Court of Appeals in *Reed* and *Luros* directing the convocation of a three-judge court made it unnecessary to institute any mandamus proceedings for *Aday, et al.*

(b) In *Reed Enterprises, et al.*, at the time of the filing of the complaint and the application for a three-judge court, there was also filed a motion for preliminary injunction. In opposition to the motion, appellees urged that the Court lacked jurisdiction over the subject matter of the complaint and that there were no circumstances justifying preliminary injunctive relief. The affidavit of Fred. M. Vinson, Jr., an Assistant Attorney General in charge of the Criminal Division of the Department of Justice, and a defendant in the action, alleged that the Department of Justice had "not taken any action with respect to plaintiffs which is intended to harass the plaintiffs or to abridge any freedoms to which they are entitled", and that any grand jury investigation or prosecution of Appellants would be conducted in the good-faith belief that there had been a violation of the law "as interpreted by the Supreme Court of the United States". Another affidavit in opposition was submitted by Edward J. Pesce, an attorney in the General Crime Section of the Criminal Division, Department of Justice, and also a defendant in the action. The Pesce affidavit stated, among other things, that the only federal proceedings involving these plaintiffs were "those before a Federal grand jury in Houston, Texas".

Because of the failure of the District Court to convene a three-judge court as requested by plaintiffs and the institution of mandamus proceedings in the Court of Appeals, no ruling was made on the application for preliminary injunction. On September 10, 1965, the petition for mandamus was filed in the Court of Appeals and, on the same day, these Appellants were indicted in the Southern District of Texas, Houston Division, some 1,500 miles away from their businesses and

places of residences in California, and charged in a 26-count Indictment with violations of 18 U.S.C. §1462, as amended.

Following the direction by the Court of Appeals for the convocation of the three-judge court, Appellees made answer in the District Court, generally denying the allegations of the complaint and alleging as defenses that the Court lacked jurisdiction over the subject matter of the complaint, that the complaint failed to state a claim upon which relief might be granted, and admitting only that Appellants had been indicted in the Southern District of Texas, and alleging that the books and writings named in the Indictment were obscene and not entitled to constitutional protection. Thereafter, the three-judge court requested counsel to see whether or not the case could be heard on stipulated facts and, in the light of the pendency of *Ginzburg v. United States* before the Supreme Court, postponed hearing on the motion for preliminary injunction which had theretofore been made.

The date for trial of the criminal prosecution in Houston having been set for July 5, 1966, a motion for a stay of the said trial was made by Appellants on June 13, 1966 and denied by the three-judge court on June 21, 1966. The three-judge court held that the burden of defending the criminal prosecution pending in Houston did not "constitute such great and immediate danger of irreparable injury as to warrant the relief requested". A similar motion for a stay was presented to Mr. Justice Black who denied the motion on June 29, 1966 with the following endorsement:

> "As shown by the Court of Appeals opinion in Reed Enterprises v. Corcoran, 354 Fed. 2nd 519,

this proceeding involves serious constitutional questions concerning multiple prosecutions in many jurisdictions. I am denying the stay here however, solely because of the Solicitor General's statement that no other prosecutions are intended to be brought anywhere based on the materials here involved—Petition denied."

Thereafter, counsel for the respective parties, and in accordance with the request of the three-judge court, entered into a stipulation of facts with respect to the three consolidated causes pending before the Court. Attached hereto as Appendix D is a copy of the said Stipulation. With respect to *Reed Enterprises, et al.*, it was stipulated (Appendix D, pp. 45-47) that the principal place of business was in San Diego, California; that the 26-count Indictment returned in Houston, Texas involved seven books entitled respectively, *Orgy Club, Sin Summer, Shame Hunger, Temple of Shame, Virgins, Inc., Passion Carousel* and *Swap Sect;* that the books had been transported into the Southern District of Texas in the regular course of Appellants' business operations and purchased from local retail outlets by agents of the Federal Bureau of Investigation; that on September 2, 1966, following an 8-week trial before a jury, in which all of the individuals accused and their five attorneys were present throughout, the jury reported itself deadlocked and was dismissed; that motions for judgments of acquittal were denied and the case scheduled for retrial commencing on May 15, 1967[3];

[3]On April 26, 1967, the Honorable Joe Ingraham, a United States District Judge for the United States District Court, Southern District of Texas, Houston Division, and the trial judge who presided at the trial in Houston which resulted in the deadlocked

(This footnote is continued on the next page)

and that there had been no other federal criminal proceedings against the Appellants relating to any of the publications aforementioned.

(c) In *Luros, et al.*, there was a similar motion for preliminary injunction in conjunction with the filing of the complaint and the application for the convening of a three-judge court. At the time of the filing of the aforesaid papers, the Appellants had already been indicted on March 24, 1965 in the Northern District of Iowa, Western Division, under a 25-count Indictment charging Appellants with violations of 18 U.S.C. §§1461 and 1462, as amended, and conspiracy to violate said statute. The Appellants were being required to face a trial over 1,500 miles from Los Angeles, California, their place of businesses and residences.

As in *Reed Enterprises* aforesaid, similar opposition to the motion for preliminary injunction was submitted by the Appellees and, again, no ruling was made on the application for the preliminary injunction pending the mandamus proceedings in the Court of Appeals. Again following the direction of the Court of Appeals for the convocation of the three-judge court. Appellees made answer and in similar fashion hearing on motion for preliminary injunction was postponed pending the formulation of stipulated facts as requested by the three-judge court. There were also applications for stays of the trial in Sioux City, Iowa, all of which were denied. Thereafter, counsel for the respective parties entered into the same stipulation of facts (Appendix D).

With respect to the *Luros, et al.* proceedings, it was stipulated (Appendix D, pp. 47-53) among counsel

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jury, granted a motion for transfer of the proceedings to the United States District Court for the Southern District of California. *United States v. Hamling, et al.*, Criminal No. 65-H-172.

for the respective parties that on March 24, 1965, in Ft. Dodge, Iowa, these Appellants were indicted on 25 counts for allegedly shipping interstate and mailing quantities of six different paperback books and 25 different magazines into the Northern District of Iowa in violation of the federal obscenity statutes. The books involved in the Indictment were entitled: *Lesbian Sin Song, Two Women in Love, Pleasure House, Lesbian Alley, The Three Way Apartment* and *The Affairs of Gloria*. The magazines involved were various issues of so-called nudist and "girlie" magazines.

It was further stipulated between the parties that only two copies of each of five of the books named in the Indictment and three copies of the other book were ever mailed into the Northern District of Iowa, and this was done by "test orders" sent from the Northern District of Iowa at the behest of various Postmasters in Iowa, St. Louis and Los Angeles. This same decoy method was used to obtain a number of the magazines named in the Indictment.

It was stipulated that the trial in the Northern District of Iowa began on October 18, 1965; that prior to the submission of the case to the jury, District Judge William C. Hanson dismissed the conspiracy count and six other counts of the Indictment involving "girlie" magazines. In all, 18 of the original 25 counts were submitted to the jury. With the exception of two of the counts of the Indictment, all of the remaining 16 counts in the Indictment were based on books and magazines which had been surreptitiously ordered by a Postal Inspector in California through intermediaries in Iowa, as the stipulation reveals.

The jury found all parties guilty on each of the 18 remaining counts of the Indictment. Motions for judgments of acquittal were later granted as to all individual Appellants, except Appellant Milton Luros, and the corporate Appellants. On January 6, 1967, the individual Appellant was sentenced to five years imprisonment and fined $25,000. Two of the corporate Appellants were each fined $25,000 and two other corporate Appellants were each fined $12,000. A notice of appeal was then filed.[4]

Finally, it was stipulated that there have been no other federal proceedings against Appellants at any time relating to the publications named in the Indictment.

(d) In *Aday, et al.,* the proceedings on the motion for preliminary injunction were similarly left in abeyance; the Appellees made answer, and following consolidation of the three actions and the convocation of the three-judge court, the stipulation between the parties (Appendix D) was entered into and included facts relative to these Appellants (Appendix D, pp. 42-45).

It was stipulated that the Appellants resided and had their principal place of business in Fresno, California. It was further stipulated that on April 2, 1958, the Appellant Aday was indicted in the United States District Court for the Southern District of California for three alleged violations of 18 U.S.C. §1461. While 11 pocketbooks were involved in the prosecution, only 3

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[4]The trial under the Ft. Dodge Indictment was held in Sioux City, Iowa. The appeal to the Court of Appeals for the Eighth Circuit has been argued and is awaiting determination. *Luros, et al. v. United States,* Nos. 18707 through 18711, inclusive. For various rulings made during the Sioux City trial, see *Luros v. Hanson,* 382 U.S. 956; *United States v. Luros,* 243 F. Supp. 160 (1965), 260 F. Supp. 697 (1966).

were submitted to the jury, the Government withdrawing 8 of the titles prior to submission. The jury returned a not guilty verdict with respect to a book entitled *Rambling Maids,* and deadlocked on the other 2 books entitled *Strange Three* and *Turbulent Daughters.* The entire Indictment against Appellant Aday was subsequently dismissed.

The Appellants were indicted for violations of 18 U.S.C. §1462 [as amended in 1958] in Grand Rapids, Michigan on May 24, 1960; in Phoenix, Arizona on April 26, 1960; and in Honolulu, Hawaii on October 12, 1960. In Grand Rapids, Michigan, the 18-count Indictment involved 8 books entitled respectively, *Sex Life of a Cop, Decisive Years, Witch Finder, Love Princess, Never Enough, I am a Lesbian, Desperate Moments* and *The Black Night,* the last title of which had been the subject of the aforesaid Fresno trial in 1958 and one of the books which had been withdrawn prior to submission of the case to the jury. In Phoenix, Arizona, the book involved was *Sex Life of a Cop.* And in Honolulu, the books involved were *Sex Life of a Cop, Decisive Years* and *Each Won Two.*

In Grand Rapids, Michigan, the jury disagreed as to all counts of the Indictment except the five counts involving the book *Sex Life of a Cop.* Appellants were convicted on December 12, 1963 and sentenced on December 30, 1963. Following the convictions in Grand Rapids, the proceedings in Honolulu and Phoenix were dismissed by the Government. The corporate Appellant was fined $25,000; the Appellant Aday was fined a total sum of $25,000 and sentenced to a total prison term of 25 years. The remaining individual Appellant was fined a total of $19,000 and sentenced to a total prison

term of 15 years. On March 22, 1966, the judgments of conviction were sustained by the Court of Appeals for the Sixth Circuit, but remanded for reconsideration of the sentences. *United States v. West Coast News Co., et al.*, 357 F. 2d 855. On April 6, 1966, the District Court resentenced Aday to 10 years imprisonment and the other individual Appellant to 5 years imprisonment, leaving in effect the fines which had been initially imposed. A petition for a writ of certiorari to the United States Supreme Court was filed.[5]

On March 26, 1965, the Appellants were indicted on 10 counts in Houston, Texas, again charged with violations of the federal obscenity statutes. The five titles involving in the Indictment are entitled: *The Awakening of Cindy, The Girls of Club Sappho, The Women Were Willing, The Swingers* and *Twisted Passions.* All of the alleged transportations occurred after the return of the Indictment in Grand Rapids, Michigan, and 6 of the said alleged transportations occurred after the Grand Rapids conviction. There have been no other federal criminal proceedings against Appellants relative to the aforementioned publications.

The books named in the Honolulu, Grand Rapids and Houston Indictments were transported into the Districts in the regular course of Appellants' business. In each case, the books were then purchased from local retail outlets by agents of the Federal Bureau of Investigation.

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[5]On June 12 1967, the Supreme Court granted the petition for a writ of certiorari and reversed the judgment of the Court of Appeals, based on *Redrup v. New York,* 386 U.S. 767 (388 U.S. 447). For related decisions, see *Aday v. United States District Court for Western District of Michigan,* 318 F. 2d 588 (6 Cir. 1963), Cert. denied 385 U.S. 39; *United States v. West Coast News Co., et al.,* 30 F.R.D. 13 (1962), 216 F. Supp. 911 (1963), and 228 F. Supp. 171 (1964).

(e) Appellants moved for summary judgment based upon the pleadings and the stipulation of facts (Appendix D). Appellees moved to dismiss each of the actions upon the grounds that the Court lacked jurisdiction and that Appellants stated no basis for equitable relief. In the alternative, Appellees moved for summary judgment against Appellants in each of the actions based upon the stipulation of facts (Appendix D) and the affidavit of Fred M. Vinson, an Assistant Attorney General, setting forth what purported to be the policy of the Department since the enactment of the 1958 Amendments to 18 U.S.C. §§1461 and 1462.

(f) On October 26, 1967, the three-judge court rendered its opinion and judgment, denying the motion to dismiss, denying appellants' motion for summary judgment and granting the motion of Appellees for summary judgment, in the consolidated causes (Appendix A). The District Court held that the federal obscenity statutes are founded on the powers of Congress to exclude "objectionable and non-constitutionally protected material" (Appendix A, pp. 6-7) from the mails; that where a crime involves some aspect of interstate or foreign commerce, Congress is constitutionally empowered to determine where venue will lie for purposes of federal jurisdiction; that Congress could constitutionally designate as a continuing offense the use of the mails for transporting obscene material and that such designation did not violate the Sixth Amendment venue provisions of the Constitution. The District Court further held that neither the due process nor free speech and press provisions of the Constitution were violated by the 1958 Amendments to the federal obscenity statutes. The Court stated that every criminal prosecution

in an obscenity case may have some deterrence upon the exercise of freedoms of speech and press, and that "any increase in apprehension which may accrue on a purely subjective basis by reason of the injection of a multiple-venue provision is at most ancillary and *de minimis*". (App. A, p. 21).

The notice of appeal to this Court was filed on December 12, 1967.

The Questions Are Substantial.

1. 18 U.S.C. §§1461 and 1462 were amended on August 28, 1958 to provide generally that whoever knowingly uses the mails for the mailing, or knowingly uses any express company or any other common carrier for carriage in interstate commerce, anything declared by the law to be nonmailable is subject to fine and imprisonment [Pub.L. 85-796, §§1-2, 72 Stat. 962]. Prior to the enactment of the said Amendments, the offense under the federal obscenity statutes was held to be complete when the deposit for mailing or delivery was made. The courts uniformly held that the offense under the federal obscenity statutes did not involve the use of the mails, as that phrase is used in 18 U.S.C. §3237. The courts held that the latter statute must be read in the light of the Sixth Amendment to the United States Constitution, and that there was a clear distinction between a deposit for mailing or delivery and the use of the mails. *United States v. Ross,* 205 F. 2d 619 (10 Cir. 1953).[6]

The Bill to amend the federal obscenity statutes was introduced into the House in 1957. [H. R. 6239]. Be-

[6]No venue question was presented in *Roth-Alberts,* 354 U.S. 476, decided prior to the 1958 Amendments. See, *Ginzburg v. United States,* 383 U.S. 463, 464, n.1.

fore a House Judiciary Committee which had the Bill under consideration, witnesses appeared to urge the defeat of the proposed measure because, it was argued, enactment of the Bill "would create new risks for reputable publishers and booksellers; [it] would subject them to community standards which might be quite different from their own, to the disparate standards of every American community into which their books might be sent. . . . A pliant or zealous prosecutor might be persuaded to press for an indictment . . . Publishers could be forced to transport lawyers, witnesses, and other ammunition for defense to a distant, hostile place. . . ." Paul and Schwartz, *Federal Censorship: Obscenity in the Mail* 185-186 (1961).

On May 17, 1957, the General Counsel for the Post Office Department wrote to the Chairman of the Judiciary Committee of the House, urging enactment of the Bill in order to "settle the jurisdictional question so that violators . . . can be prosecuted at the place of mailing, at the place of address or delivery, or in any judicial district through which the objectionable matter is carried in the mails". The General Counsel added: "The circulation of obscene matter in any community tends to debase its morals. Therefore, its citizens should be free to prosecute the persons responsible for such obscenity." 1958 U.S. Code, Cong. and Ad. News 4014-4015. Sec. 104 Cong. Rec. 8991-8996, 15610-15611 (1958).

When the Bill was sent to the Senate, the Attorney General wrote to the Vice President on March 14, 1957, advising him that the Department of Justice supported the proposed measure and stated: "This measure is intended to overcome the effect of the Ross de-

cision, making it possible to prosecute violators of section 1461 at the place of which the objectionable matter is mailed, at the place of address or delivery, or in any judicial district through which such mail matter is carried. Thus, the amendment will materially increase the effectiveness of the statute." 1958 U.S. Code, Cong. and Ad. News 4015-4016.

The Senate however, while giving general approval to the Bill, suggested a substitute measure. S. Rep. No. 1839, July 15, 1958 [to accompany H.R. 6239]. The Senate proposed that the Bill be amended to make it possible to prosecute violators only at the place where the matter was mailed, or at the place of address or delivery. "In this respect it takes a middle ground between the *Ross* case cited above (which would allow prosecution only at the place of deposit) and section 3237 of title 18, United States Code (which would allow prosecution in any district from, through, or into which the mail matter moves)." It was stated that the adoption of this middle view was based upon the ground "that unrestricted 'forum shopping' can lead to abuses and is, therefore, against public policy". 1958 U.S. Code, Cong. and Ad. News 4013.

Thereafter, the House disagreeing with the Senate Amendments to the proposed Bill, the measure was sent to conference. The Conference Report stated that it was "the position of the Post Office Department that the crime of sending obscene matter through the mails is a *continuing crime* from the point of deposit, in transit, and at the point of delivery. The House concurred in the position of the Post Office Department. . . ." The Conference Report added: "Question has been raised as to whether the Post Office Department in-

tends to press for the prosecution of violations of the law in the jurisdictions through which the unlawful mailed matter passes in transit, if the language of the House of Representatives is restored to the Bill by the conferees. In a letter dated August 5, 1958 . . . the Post Office Department answers this question 'emphatically' in the negative." 1958 U.S. Code, Cong. and Ad. News 4017.

The House version was finally reported out and passed. The measure was approved on August 28, 1958.[7]

2. The legislative history indicates a clear Congressional intent to authorize multi-venue prosecutions under the federal obscenity statutes based upon the local community standards of each and every community in which books or writings are mailed, at their place of address or delivery, or in any district through which the material is carried or transported. This view has been expressed by a number of judges in the Federal Courts before whom the question has been raised. Thus, in *United States v. Frew,* 187 F. Supp. 500 (D.C. Mich. 1960), Circuit Judge O'Sullivan (sitting by designation) denied collateral estoppel effect to earlier District Court proceedings in Los Angeles in which allegedly the same materials as those forming the basis of the

[7]Upon the enactment of the Bill, "the Judiciary Committee openly warned that United States prosecutors were not to abuse their new power". Paul and Schwartz, *Federal Censorship: Obscenity in the Mail* 186. Nevertheless, the Post Office Department stated that it would press "the use of this new legislation to the fullest possible extent . . . to attempt to prevent the use of the mails for indecent material and to seek indictments and prosecutions for such offenses and even though it may be argued that it falls in the category of material concerning which there has been previous rulings favorable to the promoters". Subcommittee on Postal Operations of the Committee on Post Office and City Service, H. of Rep. 86th Cong., 1st Sess., Obscene Matter Sent Through Mail, 4-6 (Comm. Print 1959).

Michigan prosecution were found to be not obscene, and stated: "[W]hat the community of Los Angeles may have found not obscene may meet a different standard in Michigan. . . . One who chooses to carry on an enterprise which might indeed offend criminal statutes enforceable in places in which he proposes to carry on his enterprise, must take the hazards involved" (187 F. Supp. at 506-507).

In *United States v. West Coast News Co.*, 30 F.R.D. 13 (D.C. Mich. 1962), District Judge Starr, in denying a motion for transfer under Fed. Rules Crim. Proc. Rule 21(b), stated: "As intended by the Congress, a jury drawn from this district will be familiar with and best able to apply the local community standards in determining whether books were obscene and in violation of the statutes. It is obvious that a jury drawn from the southern district of California would not have knowledge of the community standards in this western district of Michigan. To grant defendants' motion . . . would deprive the citizens of the western district of Michigan of the opportunity to evaluate the books and determine whether they are obscene under local community standards." (30 F.R.D. at 19-20).

In denying a motion for reargument of the motion to transfer the proceedings, District Judge Fox in Grand Rapids, Michigan adhered to the views of Judge Starr and stated: " 'The common conscience of the community' is to be determined by a jury in the district in which the action is brought. It was the intent of Congress that this action could be brought in this district, where the material had been disseminated." *United States v. West Coast News Co.*, 216 F. Supp. 910, 926 (D.C. Mich. 1963).

In upholding the Grand Rapids judgments of conviction, the Court of Appeals for the Sixth Circuit stated: "We consider Judge Starr's opinion a quite adequate exposition of the rule that the involved motion was addressed to the discretion of the District Judge and a clear demonstration that his discretion was soundly exercised. . . . Appellants had no constitutional right to be tried in their 'home' state even though the crimes charged were committed there as well as in the State of Michigan where they chose to do business." *United States v. West Coast News Co.*, 357 F. 2d 855, 861 (6 Cir. 1966).

In *United States v. Luros*, 243 F. Supp. 160 (D.C. Ia. 1965), District Judge Hanson, in denying a motion for transfer of proceedings, stated:

> "The legislative history clearly indicates the intent of Congress in enacting the 1958 amendments to the obscenity statutes. . . . The strength of this congressional feeling is indicated by Congress' willingness to override the important policy considerations behind Rule 21(b). . . . These expressions of congressional intent are highly relevant both to the ultimate question of transfer and to the defendants' claim that the prosecution could have more properly been brought in another foreign forum. . . . In the present case, however, the defendants have made shipments and mailings and the materials named in the pending indictment to all parts of the country. Each of these numerous shipments and mailings could have provided the basis for a separate indictment." (243 F. Supp. at 176-177).

See also,

Toscano v. Olesen, 184 F. Supp. 296 (D.C. Calif. 1960), opinion by District Judge Yankwich.

3. This Court admonished in *Roth* that the door barring federal intrusion into the areas of speech and press must be kept "tightly closed" and opened only "the slightest crack" necessary to prevent encroachment upon more important interests. The substantial procedural changes made in the federal obscenity statutes by the 1958 Amendments permitting multiple venue prosecutions have, it is submitted, resulted in a wide opening of the door and in a substantial intrusion into protected expression. The operation and effect of the method by which the circulation of books and other writings is restrained by the federal obscenity statutes as amended should, it is submitted, be subjected to "close analysis and critical judgment" by this Court. *Speiser v. Randall,* 357 U.S. 513-520.

In a series of decisions, this Court held that different legal procedural devices which had the effect of inhibiting freedoms of speech and press could not be upheld; that a statute on its face which is clearly capable of many abuses threatening those who exercise their rights of free expression with the burdens of a criminal prosecution is invalid; and that where a statute in addition has a potentially inhibiting effect on the exercise of freedoms of speech and press, the statute is also constitutionally invalid because it fosters self-censorship and the denial of access by the public to constitutionally protected expression.[8]

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[8] *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of property,* 367 U.S. 717; *Quantity of Copies of Books*

Statutes which require publishers and national distributors of books, magazines and other media of expression to know at their peril the standards of each of the myriad communities throughout the Nation with respect to the depiction or representation of sex, nudity and excretion are patently vague, ambiguous and overbroad. They tend inevitably to force publishers and distributors to "steer far wider of the unlawful zone". *New York Times Co. v. Sullivan,* 376 U.S. 254, 279. See also, *Speiser v. Randall,* 357 U.S. 513, 526; *Times Inc. v. Hill,* 385 U.S. 374, 389.

This country is a "melting pot" of diverse political, social, economic, ethnic and religious bodies located in thousands of urban, rural and metropolitan areas. See, *Statistical Abstract of United States* (1967), U.S. Dept. of Commerce, 1-43 (88th Annual Ed.). Statutes which purport to incorporate the multifarious standards of all divergent communities throughout the Nation are patently incapable of objective measurement. Under such laws, books, magazines and all other media of expression face suppression by the "moment-to-moment opinions" of a government official (*Shuttlesworth v. Birmingham,* 382 U.S. 87, 90); by the subjective determination of individual jurors who often label as "obscene" material which they deem objectionable (*cf., Elfbrandt v. Russell,* 384 U.S. 11, 16); and such laws act as "a trap for the innocent" publishers

v. Kansas, 378 U.S. 205; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Freedman v. Maryland,* 380 U.S. 51. See also, *New York Times Co. v. Sullivan,* 376 U.S. 254; *Dombrowski v. Pfister,* 380 U.S. 479; *Giaccio v. Pennsylvania,* 382 U.S. 366; *Elfbrandt v. Russell,* 384 U.S. 11; *N.A.A.C.P. v. Button,* 371 U.S. 415; *Baggett v. Bullitt,* 377 U.S. 360; *Ashton v. Kentucky,* 384 U.S. 195; *Keyishian v. Bd. of Regents,* 385 U.S. 589; *Whitehill v. Elkins,* 389 U.S. 54; *United States v. Robel,* 88 S. Ct. 419; *Zwicker v. Koota,* 88 S. Ct. 391.

and national distributors of constitutionally protected material (*Whitehill v. Elkins,* 389 U.S. 54, 60). Such statutes do violence to "the larger principle that the freedoms of expression must be ringed about with adequate bulwalks". *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66). Since the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn, "the separation of legitimate from illegitimate speech" calls for more sensitive tools than is presented by 18 U.S.C. §§1461 and 1462, as amended. *Speiser v. Randall,* 357 U.S. 513, 525.

In view of the plain intention manifested by the Congress in the enactment of the 1958 Amendments to the federal obscenity statutes, it is submitted that the statutes have been rendered unconstitutionally vague, ambiguous and overbroad, and constitute a palpable deterrence to the exercise of freedoms of speech and press guaranteed by the provisions of the First Amendment.

4. (a) The opinion of the District Court (Appendix A) fails to answer, it is submitted, the crucial constitutional questions raised in the case herein. Relying upon cases decided under 18 U.S.C. §3237 upholding the power of Congress to regulate the mails and to determine venue for purposes of federal jurisdiction, the Court concluded that Congress could constitutionally designate as a continuing offense "the use of the mails for transporting obscene material" (Appendix A., p. 15). Reliance was placed on such decisions as *Hyde v. Shine,* 199 U.S. 62 and *Armour Packing Co. v. United States,* 209 U.S. 56.

The issue here however does not involve a conspiracy to defraud the United States by forged affidavits, or a prosecution for the offense of obtaining transporta-

tion in interstate commerce at less than the lawful rate, but involves the use of multi-venue statutes to prosecute for the offense of mailing or shipping books, magazines and other writings ordinarily protected from governmental abridgment by the First Amendment. This Court has held that statutory procedures involving freedoms of speech and press must be judged by standards stricter than those which affect activities outside of First Amendment areas. *Speiser v. Randall*, 357 U.S. 513; *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205. The statutes, 18 U.S.C. §§1461 and 1462, as amended, inevitably compel a self-censorship by publishers and distributors throughout the Nation which seriously curtails the publication and distribution of all expression, whether entitled to constitutional protection or not.

(b) The District Court held that the injuries to publishers and distributors under the federal obscenity statutes, as amended, would be *de minimis* because, stated the District Court, "we are dealing with a *uniform* and constitutionally sufficient standard of what constitutes obscenity in a particular case, and while the criteria are uniform, uniformity of result cannot be guaranteed" (Appendix A, p. 19). Such a view, it is submitted, cannot bear critical scrutiny and analysis. It is of course possible that different juries in one particular locality may reach different results with respect to the same material, but it is quite another thing to argue that a publisher or distributor of books and magazines dealing with sex must take the risk of deciding whether or not juries in a thousand localities throughout the United States will reach a decision that the material is constitutionally protected. Such a burden is

an unreasonable and impossible one for publishers and distributors to assume. *Smith v. California,* 361 U.S. 147, 153. The constitutional difference is no less real, because, as is argued, a difference of degree only is involved.

In the second place, if a so-called uniform standard is being applied throughout the Nation, then the reason for the enactment of the 1958 Amendments is not apparent and constitutional issues are again raised. If a publisher or distributor with place of residence and business in a locality in California is to be subjected to prosecution before juries in far removed localities applying an alleged "uniform standard", then the only real purpose of the multi-venue statutes is to so harass and burden the publishers by arbitrary forum picking as to put such persons out of business. Such a purpose and consequence are incompatible with the requirements of the First Amendment. *Cf., New York Times Co. v. Sullivan,* 376 U.S. 254, 294-295; *Time, Inc. v. Hill,* 385 U.S. 374, 389.

In the third place, terms such as "contemporary community standards", "prurient interest", "social importance" and "hard core pornography" are concededly terms which are intrinsically vague and ambiguous. See, *Jacobellis v. Ohio,* 378 U.S. 184, 200; *Ginzburg v. United States,* 383 U.S. 463, 479-480. It is extremely doubtful that individual jurors in Grand Rapids, Michigan, Sioux City, Iowa, Houston, Texas, Phoenix, Arizona, or Honolulu, Hawaii, required to pass upon the alleged obscenity of a book like *Tropic of Cancer,* or *Fanny Hill,* or *Sex Life of a Cop,* can overcome their local prejudices and standards and arrive at some decision as to whether or not such writings, or sim-

ilar writings, conform to a national standard. As was stated by Mr. Justice Black in *Ginzburg* (383 U.S. at 480): ". . . But even if some definite areas were mentioned, who is capable of assessing 'community standards' on such a subject? Could one expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California? So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held. . . ." See also, Comment, "Multi-Venue and the Obscenity Statutes", 115 U. of Pa. L.Rev. 399-438 (1967); Abrams, "Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula", 9 U. of Calif. L.Rev. 751-818 (1962).

Moreover, it should be noted that the Government has always contended that it is not required to present any evidence of community standards in any obscenity prosecution, and that it is sufficient merely to place the material before the jury for its determination. Under the circumstances, it is a simple matter for a federal prosecutor who has picked his forum to stand before a jury, display the particular exhibits involved and merely ask in summation: " 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." *United States v. Klaw,* 350 F. 2d 155, 170 (2 Cir. 1965). *Cf., United States v. Davis,* 353 F. 2d 614, 615-618 (2 Cir. 1965), *cert, den'd.* 384 U.S. 953.

5. In the First Amendment area, statutes which authorize unrestrained multi-venue prosecutions at the whim of federal prosecutors can only result in abridge-

ment of the exercise of freedoms of speech and press and the arbitrary and capricious deprivation of liberties without due process of law. Such an unlimited delegation of powers by Congress to officials in the Executive Department "creates the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of protected freedoms" (*United States v. Robel,* 88 S. Ct. 419, 428). The prosecutorial discretion is left at large under the statutes without any power in an accused publisher or distributor to review the exercise of that discretion. The broad Congressional delegation deepens the vice of ambiguity and indefiniteness in the statutes and renders the standards of guilt under the law totally unascertainable (88 S. Ct. at 428-433).

Moreover, the undisputed record here presented in these consolidated causes amply establishes in fact the harsh and unascertainable results which flow from the application of the federal obscenity statutes as amended in 1958. In *Aday, et al.,* the stipulated facts show that a trial was held in Fresno in the Southern District of California under a 3-count obscenity indictment in which the jury either acquitted or disagreed, and where the indictment finally was dismissed on the Government's own motion. Nevertheless, immediately upon the passage of the 1958 Amendments the Department of Justice picked Grand Rapids, Michigan to cause an indictment to be returned involving one of the very books in the Fresno trial which the Government had withdrawn from consideration by the jury. At or about the same time, the Government was picking Phoenix, Arizona and Honolulu, Hawaii to have other indictments returned and each of the indictments in-

volving, among other books, a single book, *Sex Life of a Cop,* ultimately determined by this Court to be constitutionally protected. In 1965, an indictment was again returned charging violations of 18 U.S.C. §§1461 and 1462, as amended, and this time, the indictment was laid in Houston, Texas. These various jurisdictions were thousands of miles away from the places of business and residence of the accused, and the trial in Grand Rapids, Michigan placed tremendous physical and financial burdens upon the accused in order to properly prepare their defenses.

In *Luros, et al.,* an indictment was returned in Ft. Dodge, Iowa and the trial took place in Sioux City, Iowa, again thousands of miles away from the places of business and residence of the accused. In the Ft. Dodge indictment, sixteen defendants in all, including California corporations, officers of the said corporations, individual employees, authors, and other personnel all from California, except one defendant from Oregon, were subjected to a conspiracy prosecution as well as to charges of substantive violations of 18 U.S.C. §§1461 and 1462, as amended. An entire enterprise was compelled to meet charges at enormous distances from the places of business and residence and compelled to transport records and witnesses and go through an extended trial under inordinate physical and financial burdens.

In *Reed Enterprises, et al.,* the 26-count indictment was returned in Houston, Texas, over 1,500 miles away from the places of business and residence and required an 8-week trial before a jury in which all the individual defendants and their five attorneys were

required to be present throughout, and at the end of which time the jury reported itself deadlocked.

The Department of Justice presented to the District Court a "statement of policy", but as the District Court rightly concluded: "Constitutional considerations need a more solid basis than variable policy (Appendix A, p. 15, n. 22). Moreover, the policy statement itself leaves plenty of room for the exercise of "prosecutorial discretion". It is stated that forum-picking will depend on "where the evidence adduced presents the strongest case for successful prosecution"; that choice will be made with "congressional policy behind the 1958 Amendment" in mind; and that the policy of the Department does not preclude prosecutions for the same or similar material occurring after "the first conviction". It is also stated that among the factors in deciding which forum to be picked is "which United States Attorney's office has expressed the greatest interest in the case". It is plain that the policy statement in no way removes the inherent infirmities contained in the statutes, and the policy statement itself is a clear recognition of the tremendous power which Congress has vested in federal prosecutors to engage in arbitrary and capricious forum-picking.

Finally, the argument that an accused under the statutes may resort to Rule 21(b) of the Fed. R. of Crim. Proc. is patently untenable. In the first place, as the rulings of the lower courts reveal motions for transfer of proceedings have constantly been denied in deference to the "Congressional policy" of measuring the validity of the charges by local community standards. In the second place, Rule 21(b) is in the last analysis based upon the exercise of a discretion and

cannot, therefore, mitigate the intrinsic vagueness, ambiguity and overbreadth of the statutes.

Conclusion.

It is submitted that the questions presented by this appeal are substantial and of public importance, requiring review by the Court.

Respectfully submitted,

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